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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-679

CHARLES WOLFF, JR., individually and as Warden; RONALD B. JONES, individually and as Associate Warden, Care and Treatment; their agents, employees and servants; all employees of the Nebraska Penal Complex, Lincoln, Nebraska,

Petitioners,

v.

ROBERT O. McDONNELL, individually and on behalf of all prisoners in the same class as plaintiff incarcerated at the Nebraska Penal Complex, Lincoln, Nebraska,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Brief of the American Bar Association, Amicus Curiae

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INTEREST OF AMERICAN BAR ASSOCIATION

The American Bar Association is the national organization representing the American legal profession. In 1973 the A.B.A. had more than 165,000 members, who comprise over one-half of the total number of lawyers in the United States.

The interest of the A.B.A. in the administration of criminal justice is evidenced by its Project on Standards for

Criminal Justice. A special committee on Standards for the Administration of Criminal Justice has been established to provide supervision and coordination of the Project. The Project, which began in 1964, has been devoted to developing the best practices and procedures as standards to govern the administration of criminal justice, including the development of guidlines for law enforcement officers, prosecutors and defense counsel.

In 1970, the A.B.A. established an interdisciplinary Commission on Correctional Facilities and Services to initiate programs and to formulate guidlines in the field of correctional law and practice. Such programs have facilitated improvements, both legal and operational, in state and local systems for reintegrating criminal offenders into society. The Resource Center for Correctional Law and Legal Services, an example of the Commission's activities, has been concerned with the development of legal principles, including those of constitutional dimension, arising from the operation of our correctional programs.

The A.B.A. has a direct commitment to assist in the development of the case law involving constitutional issues arising out of American prisons. Moreover, the A.B.A. has direct interest in cases involving the attorney-client privilege, including application of the privilege to persons in prisons.

The A.B.A. has not taken a position on other issues which are raised in this case. The silence of the A.B.A. on those issues should not necessarily be interpreted as a position in either support of or opposition to them.

SUMMARY OF ARGUMENT

In the view of amicus, the judgment of the court below as regards the mail inspection rule should be affirmed.

Amicus contends that in the case of attorney-prisoner mail, a mail inspection rule, without the requirement of a showing of a real possibility of contraband, unconstitutionally restricts the attorney-client relationship. A prisoner's right to pursue claims against prison officials in a judicial forum is infringed, in violation of the Fifth and Fourteenth Amendments, by a mail inspection rule which permits the defendant prison officials to inspect mail received from the plaintiff's lawyer. Regarding lawyer representation in defending a prisoner against a criminal or disciplinary charge, the mail inspection rule violates the Sixth Amendment right to counsel. As to both categories of representation, such censorship has particularly harmful impact on indigent prisoners in violation of the equal protection clause of the United States Constitution. And such censorship destroys the confidentiality of the attorney-client relationship.

Inspection of Attorney-Client Mail Unconstitutionally Restricts the Attorney-Client Relationship

Courts uniformly recognize that an important constitutional right retained by prisoners is the right of access to the Court. Prison officials may not unreasonably restrict this right. "It is a precious right, and its administratively unfettered exercise may be of incalculable importance in the protection of rights even more precious." *Coleman v. Peyton*, 362 F.2d 905, 907 (4th Cir. 1966). Also, see, e.g.,

Johnson v. Avery, 393 U.S. 483 (1969); *Ex parte Hull*, 312 U.S. 546 (1941); *Gilmore v. Lynch*, 319 F.Supp. 105 (N.D. Cal. 1970), aff'd sub nom *Younger v. Gilmore*, 404 U.S. 14 (1971).

A prisoner's right of access to the Court necessarily includes the right to seek and obtain assistance from an attorney. *Nolan v. Scafati*, 430 F.2d 548 (1st Cir. 1970); see *Palmigiano v. Travisono*, 317 F.Supp. 776, 789 (D.R.I. 1970).

When a prisoner, represented by an attorney, seeks to prosecute a claim against prison officials regarding the legality or constitutionality of their policies or practices, the attorney-client relationship cannot be restricted, consistent with the Sixth and Fifth Amendments, by a mail inspection rule which allows prison officials to open attorney-client mail. Such restrictions on the attorney-client relationship are serious enough to raise a *prima facie* violation of due process protected by the Fifth and Fourteenth Amendments.

To allow the prison officials, who may be a named defendant in a prisoner's lawsuit, by means of inspection, to have access to the attorney-prisoner lawsuit preparations manifestly interferes with the right of due process and lower federal Courts have frequently enjoined such practices. E.g., *Rhem v. McGrath*, 326 F.Supp. 681, 691 (S.D.N.Y. 1971); *Marsh v. Moore*, 325 F.2d 392 (D. Mass. 1971); *Palmigiano v. Travisono, supra.*

When a prisoner seeks legal representation to defend a criminal or disciplinary charge, such a restriction on the attorney-client relationship constitutes a violation of the Sixth Amendment right to counsel. *Conklin v. Hancock*,

334 F.Supp. 1119, 1123 (D.N.H. 1971). Lower federal Courts have, in other contexts, held intrusion by means of secret agents, *Caldwell v. United States*, 205 F.2d 879 (D.C. Cir. 1953), *cert. denied*, 349 U.S. 930 (1955) or wiretapping, *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951), to be a deprivation of the client's constitutional right to counsel. Amicus asserts that instrusion by means of mail inspection, when mail is often the sole or primary means of communication for prisoner-clients, constitutes a denial of the constitutional right to counsel.

Significantly—both as to claims against the institution and as to criminal or disciplinary charges—the inspection of attorney mail is a special restriction on indigent prisoners. As an economic matter, these prisoners must often rely on mail to communicate confidentially with attorneys. Hence such restrictions deny indigent prisoners the equal protection of the law.

Moreover, attorneys have the greatest interest in upholding the protection of confidentiality necessary for adequately representing their clients. The unabridged right to confidential correspondence is essential if the attorney is to receive full disclosure in order to competently represent his client. It asks too much of an attorney to subject his prisoner-client correspondence to indiscriminate openings by prison officials. If such opening is not to gain advantage by prison officials in prisoner litigation, then there must be good reason for it in each case. If there is good reason, requiring a showing of a real possibility of contraband by prison officials is not an unreasonable burden.

The necessity for confidentiality, from the attorney's standpoint and indeed from the standpoint of a rational

criminal justice process, is forcefully set forth in the American Bar Association Project on Standards for Criminal Justice.

> *Standard 3.1 Establishment of Relationship.*
>
> • • •
>
> *Commentary*
>
> a. *Confidentiality.*
>
> Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence. Without it, the client may withhold essential information from the lawyer.
>
> • • •
>
> It is to encourage candor and full disclosure that the obligation of confidentiality which surrounds the lawyer-client relationship has been enacted.
>
> • • •
>
> American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function, The Defense Function, Sec. 3.1, Commentary a. Confidentiality, p. 201 (1970).

The Commentary continues as follows:

> d. *Correspondence between Lawyer and Client—Censorship of Mail.*
>
> It is fundamental that there should be untrammelled communication between client and lawyer.
>
> • • •
>
> [T]he Supreme Court has said that "even in a jail, or perhaps especially there, the relationship which the law has endowed with particularized confidentiality must continue to receive unceasing protection . . . . *Lanza v. New York*, 307 U.S. 139, 143-44 (1962). Censorship of correspondence between prisoners and their lawyers may inhibit communication and impair the relationship, require time-consuming and expensive travel to insure confidentiality, or even serve as a means of preventing legitimate grievances from being brought to light.

• • •

Id., Commentary d., p. 203-04.

For these reasons, the American Bar Association adopted the following *Standard.*

> Standard 3.1(d). Personnel of jails, prisons and custodial institutions should be prohibited by law or administrative regulation from examining or otherwise interfering with any communication or correspondence between a client and his lawyer relating to a legal action arising out of charges or incarceration.

Id., p. 200-01.

The American Bar Association, speaking for the profession, has also treated the lawyer's role vis-a-vis confidential communication in its Code of Professional Responsibility.

> CANON 4 — A LAWYER SHOULD PRESERVE THE CONFIDENCES AND SECRETS OF A CLIENT.
>
> *Ethical Considerations*
>
> EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

American Bar Association Code of Professional Responsibility, p. 16 (Martindale-Hubbell, Inc. 1970)

Without confidential correspondence, an attorney cannot provide the representation which the Professional Code of Responsibility requires of him. The prospect of prison officials being able to open any and all attorney mail without a showing of a real possibility of contraband will have a chilling effect on corresponding attorneys. Moreover, confidential attorney-client correspondence encourages the client to seek early assistance and thereby allows the attorney to promptly and expeditiously resolve legal claims.

With respect to indigent prisoners, the bar has long identified the equal protection problems raised by indigency and has taken it upon itself to provide legal services to those in need. Mail inspection necessarily interferes with the carrying out of that obligation.

> CANON 2 — A LAWYER SHOULD ASSIST THE LEGAL PROFESSION IN FULFILLING ITS DUTY TO MAKE LEGAL COUNSEL AVAILABLE.
>
> • • •
>
> EC 2-25 Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointment on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvment in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Ac-

cordingly, legal aid offices, lawyer referral services, and other related programs have been developed by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

American Bar Association Code of Professional Responsibility, *supra* at p. 5-6.

CONCLUSION

For the above reasons, the American Bar Association respectfully urges the Court to affirm that portion of the decision of the United States Court of Appeals, Eighth Circuit, which permits opening of incoming mail from an attorney (and in the presence of the prisoner-addressee if marked "Privileged") *only if* manipulation of the envelope, use of fluoroscopes and metal detectors or other alternate means fail to disclose contraband *and* there is a real possibility that contraband is contained in that envelope.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CHESTERFIELD SMITH, attorney for amicus, hereby certify that three (3) copies of this brief were duly served upon attorneys for both parties by mail service, postage prepaid.

Chesterfield Smith